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No. 99-75

In the Supreme Court of the United States

BARRY KAPLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government offered sufficient proof of an effect on interstate or foreign commerce to support petitioner's convictions for conspiring to commit, and attempting to commit, extortion, in violation of the Hobbs Act, 18 U.S.C. 1951.

2. Whether the Hobbs Act requires proof of an adverse effect on commerce.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 17a-34a) is reported at 171 F.3d 1351. The order of the court of appeals vacating the panel opinion and granting rehearing en banc (Pet. App. 15a-16a) is reported at 148 F.3d 1223. The panel opinion of the court of appeals (Pet. App. 1a-14a) is reported at 133 F.3d 826.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 9, 1999. The petition for a writ of certiorari was filed on July 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiracy to commit extortion, in violation of 18 U.S.C. 1951, and one count of attempted extortion, in violation of 18 U.S.C. 1951 and 2. Petitioner was sentenced to 30 months' imprisonment, to be followed by a three-year term of supervised release. A panel of the court of appeals reversed. Pet. App. 1a-14a. The court of appeals vacated the panel opinion and granted rehearing en banc. *Id.* at 15a-16a. The en banc court of appeals affirmed petitioner's convictions. *Id.* at 17a-34a.

1. In 1984 and 1985, petitioner, a resident of Florida, utilized the services of Panamanian lawyer Pablo Arosemena to place several hundred thousand dollars into two Panamanian bank accounts. Between 1984 and 1989, various transfers of funds were made from those accounts to bank accounts throughout the world. Petitioner gave Arosemena power of attorney over the Panamanian accounts to disguise petitioner's ownership of the funds and thereby evade taxation in the United States. Pet. App. 18a-19a.

In 1989, petitioner was in financial peril and sought return of the funds that remained in the Panamanian accounts. Arosemena refused to return the funds, however, and threatened to report petitioner to the United States Internal Revenue Service if petitioner continued to press for the money. Petitioner hired another Panamanian attorney, Mario Fonseca, to investigate the matter, and Fonseca discovered that Arosemena had withdrawn money from the accounts. Pet. App. 19a.

Petitioner then consulted Roy Gelber, a newly-elected Dade County Circuit Judge, who had previously represented petitioner when Gelber was in private practice. Gelber in turn consulted his friend Raymond Takiff, a Florida attorney who was representing General Manuel Noriega, then the de facto ruler of Panama. Petitioner, Takiff, and Gelber devised a plan whereby soldiers from the Panamanian Defense Force would be sent to Arosemena's office and would force him to sign cards for the withdrawal of petitioner's money. The conspirators ultimately agreed that petitioner would accept a check in Florida, payable to a Bahamanian lawyer, referenced to an offshore account. Pet. App. 19a-21a.

Unbeknownst to petitioner or Gelber, Takiff had begun cooperating with United States law enforcement officials shortly after the formation of the conspiracy. As part of the government's investigation, petitioner was informed (untruthfully) that Panamanian soldiers had visited Arosemena and had used force against him in an effort to obtain access to petitioner's money. In fact, however, the plan was never carried out. Pet. App. 20a-21a & n.5.

2. At the conclusion of the evidence at trial (Pet. App. 21a), the district court granted petitioner's motion for a judgment of acquittal on a charge of collecting an extension of credit by extortionate means, in violation of 18 U.S.C. 894. Petitioner was convicted of conspiracy to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; and attempted extortion, in violation of 18 U.S.C. 1951 and 2.[1]

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[1] The Hobbs Act establishes criminal penalties for any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by

3. A panel of the court of appeals reversed, holding that the government had failed to establish the nexus to interstate commerce required by the Hobbs Act. Pet. App. 1a-14a. The court stated that "[t]he typical Hobbs Act case involves some element of commerce independent and apart from the transaction of paying an extortionist's demand." *Id.* at 8a. In the court's view, the "legislative emphasis on protecting industry and business explains the judicial focus on the victim's connection to interstate commerce rather than the form or structure of the extortion payment." *Id.* at 9a. The court acknowledged that "Congress has the power to make the receipt of an extortion payment across a State border a federal crime," but it concluded that "the language and history of the Hobbs Act does not indicate that Congress intended this statute to perform any such function." *Ibid.*

Relying on *United States* v. *DeParias*, 805 F.2d 1447, 1450 (11th Cir. 1986), the court of appeals panel concluded in addition that "[t]he government's position also runs afoul of our requirement that the effect on commerce be adverse." Pet. App. 13a. The court acknowledged that "a few of our sister circuits have criticized our choice of words in *DeParias*," but it asserted that "the requirement of an adverse effect on commerce is consistent with the language of the statute and describes the typical Hobbs Act prosecution in which a defendant targets a business entity and thus hampers that victim's ability to engage in commerce." *Ibid.*

4. The court of appeals vacated the panel opinion and granted rehearing en banc. Pet. App. 15a-16a.

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robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a).

The en banc court affirmed petitioner's convictions. *Id.* at 17a-34a.

The court held that the government had established the requisite effect on commerce through proof "that the movement of substantial funds from Panama to Florida was the object of the coconspirators' extortion plan." Pet. App. 25a. The court also observed that "[t]he plan was orchestrated in the United States to be carried out in another country. So, the different locations of the coconspirators necessitated activity in interstate and foreign commerce to coordinate the scheme." *Id.* at 26a. It noted that Takiff had traveled to Panama and had placed several interstate telephone calls during the planning stages of the plot. *Id.* at 26a-27a. The court concluded that "the potential effects, combined with the evidence of actual effects, are sufficient to establish the minimal effect on commerce required under the Hobbs Act." *Id.* at 28a.

The court rejected petitioner's contention that the Hobbs Act requires an "adverse" effect on interstate or foreign commerce. Pet. App. 28a-30a. The court observed that the words of the Act "do not lend themselves to restrictive interpretation," *id.* at 29a (quoting *United States* v. *Culbert*, 435 U.S. 371, 373 (1978)), and that "[n]o modifier of the verb 'affect' is in the plain language of the statute," *ibid.* The court concluded that the broad language of the Hobbs Act "is evidence that Congress intended to protect commerce from any and all forms of effects," and it noted that several other courts of appeals have "refused to engraft the word 'adversely' onto the plain statutory language." *Ibid.* The court recognized that the Second and Fifth Circuits "have written that an adverse effect is an element of a Hobbs Act case." *Id.* at 30a. It observed, however, that "neither of those cases directly presented the

question of whether only an adverse effect on commerce will do," and that neither court had actually applied the "adverse effect" requirement to decide the case before it. *Ibid.*

Four members of the en banc court of appeals dissented. Pet. App. 31a-34a. The dissenting judges would have held that the language of the Hobbs Act "draws a distinction between extortion that *affects* commerce and extortion that *constitutes* or *produces* commerce." *Id.* at 32a. They acknowledged that "Congress has the power to criminalize both types of extortion," but concluded that "the Hobbs Act addresses only the former." *Id.* at 33a.

ARGUMENT

Petitioner contends (Pet. 7-16) that his extortionate scheme was not covered by the Hobbs Act because it lacked a sufficient connection to interstate commerce. He also argues (Pet. 17-19) that the Hobbs Act requires proof of an "adverse" effect on commerce. Those claims lack merit and do not warrant this Court's review.

1. a. The Hobbs Act establishes federal criminal penalties for any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). As this Court has recognized, "[t]hese words do not lend themselves to restrictive interpretation." *United States* v. *Culbert*, 435 U.S. 371, 373 (1978). Rather, the use of such broad jurisdictional language demonstrates "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence." *Ibid.* (quoting *Stirone* v. *United States*, 361 U.S. 212, 215 (1960)). See also *Allied-Bruce Terminix*

Cos. v. *Dobson*, 513 U.S. 265, 273 (1995) ("That phrase—'affecting commerce'—normally signals Congress' intent to exercise its Commerce Clause powers to the full."). As the en banc court of appeals correctly held (Pet. App. 24a-26a), the government in this case established the requisite effect on commerce through proof that the object of petitioner's extortionate scheme was to bring about the transfer of funds from a foreign country to a point within the United States.

b. Petitioner argues (Pet. 8-9) that the decision below conflicts with this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). That claim is without merit. The Court in *Lopez* held that Congress had exceeded its Commerce Clause authority by enacting a statute (18 U.S.C. 922(q)) that criminalized gun possession in the vicinity of schools without requiring proof that each instance of gun possession bore some connection to interstate commerce. The Court emphasized that Section 922(q) "by its terms ha[d] nothing to do with 'commerce'" and "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the [criminal act] in question affect[ed] interstate commerce." 514 U.S. at 561. The Hobbs Act, by contrast, is directed at a form of economic activity—extortion—and it contains an express jurisdictional element.

That the impact on interstate commerce of an individual Hobbs Act violation may be slight does not undermine the Act's constitutional validity. This Court has recognized that Congress, in enacting the Hobbs Act, intended to exercise the full extent of its Commerce Clause authority. *Culbert*, 435 U.S. at 373; *Stirone*, 361 U.S. at 215; see also *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968) ("where a general regulatory statute bears a substantial relation to commerce,

the *de minimis* character of individual instances arising under that statute is of no consequence") (quoted in *Lopez*, 514 U.S. at 558). Both before and after *Lopez*, the courts of appeals have recognized that a Hobbs Act conviction may be sustained based on evidence of a "minimal impact" on commerce. See Pet. App. 23a. As the Second Circuit has explained:

> Our cases have long recognized that the jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. * * * We now expressly hold that *Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution. * * * [O]ur sister Circuits that have addressed this question have all so held.

United States v. *Farrish*, 122 F.3d 146, 148 (1997) (citing cases from Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits) (internal quotation marks omitted), cert. denied, 522 U.S. 1118 (1998).[2]

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[2] Petitioner's reliance (Pet. 9) on *Williams* v. *United States*, 458 U.S. 279 (1982), is misplaced. The *Williams* Court relied primarily on plain-language analysis in holding that the deposit of a check that was not supported by sufficient funds "did not involve the making of a 'false statement,'" for the "simple reason" that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Id.* at 284. By contrast, the Hobbs Act literally encompasses petitioner's conduct: A scheme that would cause an extortionate payment to cross a national border constitutes an international transaction that directly "affects commerce." 18 U.S.C. 1951(a). See *Culbert*, 435 U.S. at 380 ("Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language.").

c. Petitioner relies (Pet. 9-11) on four court of appeals decisions reversing Hobbs Act convictions on the ground that the government had failed to establish a sufficient nexus between the crime and interstate commerce. Contrary to petitioner's assertion (Pet. 9), the decision below does not conflict with any of those rulings. None of those decisions endorses a per se rule that extortion or robbery of an individual (as opposed to a commercial enterprise) falls outside the Hobbs Act's coverage, and none involved a crime whose core objective was to bring about an interstate (or international) transfer of funds.

In *United States* v. *Mattson*, 671 F.2d 1020 (7th Cir. 1982), the defendants extorted $3000 from an individual who sought to obtain a supervising electrician's license from the City of Chicago. *Id.* at 1021-1023. The court reversed the Hobbs Act convictions because it found that the victim "was an individual who had no connection with interstate commerce at all," and that "the alleged conspiracy to extract money from [the victim] did not in and of itself affect interstate commerce." *Id.* at 1025. Observing that the victim's payment of $3000 did not deplete his employer's assets or affect the employer's interstate purchase of electrical supplies, *id.* at 1024, the court rejected as too attenuated the government's argument that if the victim had obtained the license, his employer's financial condition would have improved, *id.* at 1025.

The defendants in *United States* v. *Quigley*, 53 F.3d 909 (8th Cir. 1995), robbed two men of eighty cents and a pouch of tobacco, beat them, stabbed one, and left the victims on the road. *Id.* at 910. The victims were on their way to a liquor store to pick up beer at the time of the robbery, and the government argued that the crime affected commerce by preventing the victims from

reaching the store and consummating the transaction. *Id.* at 910-911. The court of appeals held that the defendants were not subject to prosecution under the Hobbs Act, explaining that the beer sale had been completed over the telephone before the robbery occurred and that there was no evidence that the victims intended to make any other purchases at the store. *Id.* at 911. The court concluded that under those circumstances, the robbery "had no effect or realistic potential effect on interstate commerce." *Ibid.*

In *United States* v. *Collins*, 40 F.3d 95 (5th Cir. 1994), cert. denied, 514 U.S. 1121 (1995), the defendant robbed a restaurant; then, as he eluded police, he stopped at a house and robbed the owner at gunpoint of cash, personal items, and his car. *Id.* at 97-98. The court of appeals reversed a Hobbs Act conviction based on the robbery at the house, finding that the crime's purported effect on commerce—a claimed interference with the victim's ability to attend a business meeting or to make business calls on his car phone—was too attenuated to satisfy the statute. *Id.* at 98-100. On those facts, the court held that the crime "caused only a speculative *indirect* effect on a business engaged in interstate commerce," an insufficient jurisdictional nexus. *Id.* at 101.[3]

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[3] Petitioner's reliance (Pet. 9, 11) on *United States* v. *Frost*, 77 F.3d 1319 (1996) (per curiam), modifying 61 F.3d 1518 (11th Cir. 1995), is also misplaced. The defendants in that case sought to provoke the resignation of a City Council member by threatening to expose a compromising videotape. The court of appeals reversed, finding that the extortionate threat was unlikely "to have the natural effect of obstructing commerce," as there was no evidence "that the resignation of one member of the six-member city council would have impacted the continuing business of that governing body." 77 F.3d at 1320. Unlike in *Frost*, the extortion

Those cases do not suggest that extortion or robbery of individuals is categorically excluded from the coverage of the Hobbs Act. Indeed, the Fifth, Seventh, and Eighth Circuits have all upheld Hobbs Act convictions in cases where an individual was the victim and the facts established an effect on commerce. See *United States* v. *Thomas*, 159 F.3d 296, 297-298 (7th Cir. 1998), cert. denied, 119 S. Ct. 2370 (1999); *United States* v. *Stephens*, 964 F.2d 424, 428-429 (5th Cir. 1992); *United States* v. *Biondo*, 483 F.2d 635, 639-640 (8th Cir. 1973), cert. denied, 415 U.S. 947 (1974); see also *United States* v. *Huynh*, 60 F.3d 1386, 1388-1389 (9th Cir. 1995); *United States* v. *Bengali*, 11 F.3d 1207, 1212 (4th Cir. 1993), cert. denied, 511 U.S. 1092 (1994); *United States* v. *Hollis*, 725 F.2d 377, 380 (6th Cir.), cert. denied, 469 U.S. 820 (1984). The decisions in *Mattson*, *Quigley*, and *Collins* rest on fact-specific determinations that the government in those cases had failed to establish any nexus between the extorted or stolen funds and any form of interstate commerce. Here, by contrast, the very object of the extortionate scheme was to bring about a transfer of funds from Panama to Florida.[4]

d. Petitioner's reliance (Pet. 14-15) on cases arising under the federal arson statute, 18 U.S.C. 844(i) (1994 &

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in this case was designed to produce a specific international movement of funds. In any event, an intra-circuit conflict would not warrant this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam)—particularly since the en banc decision in the instant case would supersede *Frost* to the extent that the two are in fact inconsistent.

[4] As the court of appeals recognized (Pet. App. 26a-27a), petitioner's scheme affected commerce in other respects as well, since the execution of the scheme involved interstate telephone calls and travel (by Takiff) between the United States and Panama.

Supp. III 1997), is also misplaced. The language of the arson statute differs significantly from that of the Hobbs Act. Section 844(i) provides criminal penalties for any person who uses fire or explosives to damage or destroy

> any building, vehicle, or other real or personal property *used in* interstate or foreign commerce *or in any activity affecting* interstate or foreign commerce.

18 U.S.C. 844(i) (1994 & Supp. III 1997) (emphasis added). By its terms, the arson statute requires proof of a nexus between the targeted property and commercial activity. The Hobbs Act imposes no such limitation.

2. Petitioner contends (Pet. 16-19) that the Hobbs Act requires an "adverse" effect on commerce. The court of appeals correctly held that the Act contains no such requirement, and its decision does not warrant this Court's review.

a. The Hobbs Act criminalizes extortion that "*in any way or degree* obstructs, delays, or *affects* commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a) (emphasis added). Because the verb "affect" is modified only by the expansive phrase "in any way or degree," the text of the Act provides no support for petitioner's contention that the requisite impact on commerce must be "adverse." Although the verbs "obstructs" and "delays" require a detrimental impact on commerce, the verb "affects" is not so limited. Indeed, Congress must be assumed to have intended each term in the series "to have a particular, non-superfluous meaning." *Bailey* v. *United States*, 516 U.S. 137, 146 (1995); see also *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995) ("[T]he Court will

avoid a reading which renders some words altogether redundant."). If "affects" were interpreted to mean "adversely affects," however, that term would be essentially redundant because the statutory phrase includes the terms "obstructs" and "delays."

b. Every court that has squarely considered the question has held that the Hobbs Act does not require an adverse effect on commerce. See Pet. App. 28a-30a; *United States* v. *Bailey*, 990 F.2d 119, 125 (4th Cir. 1993) ("A requirement that the effect on interstate commerce must be adverse is without support and is contrary to many cases that have found the jurisdictional requirement satisfied upon a threatened effect."); *United States* v. *Tormos-Vega*, 959 F.2d 1103, 1113 (1st Cir.) ("The commerce element may be satisfied * * * where the extortion has a beneficial effect on interstate commerce.") (internal quotation marks omitted), cert. denied, 506 U.S. 866 (1992); *United States* v. *Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982) ("Even a beneficial effect on interstate commerce * * * is within the prohibition of the statute."). As the Fourth Circuit explained, "[a]lthough the word 'adverse' has been loosely used in expressing the effect on interstate commerce, such adverse effect is not an essential element of the crime that must be proved by the prosecution in a Hobbs Act case." *Bailey*, 990 F.2d at 126.

The two cases on which petitioner relies (Pet. 17 n.2) do not squarely conflict with the cases cited above. In *McLaughlin* v. *Anderson*, 962 F.2d 187 (2d Cir. 1992), the court affirmed the dismissal of a civil RICO case on the ground that the plaintiff had failed to allege with particularity two predicate acts of racketeering. *Id.* at 190-194. In finding that the plaintiff had adequately pled a single predicate act of extortion, the court described the Hobbs Act as requiring proof that the de-

fendant induced the plaintiff to part with property through the wrongful use of force, violence, or fear, "in such a way as to adversely effect [*sic*] interstate commerce." *Id.* at 194. No party raised the question whether the effect on commerce must be adverse; indeed, it is not clear from the facts described in the opinion that the impact was adverse in that case. See *ibid.* (defendant made threats "in an effort to force [the plaintiff] into a joint venture with [a third party]"). And in *United States* v. *Snyder*, 930 F.2d 1090 (5th Cir.), cert. denied, 502 U.S. 942 (1991), the court stated that "[t]he judge correctly instructed the jury that to establish an offense under the Hobbs Act, the government must prove * * * that the extortionate transaction delayed, interrupted, or adversely affected interstate commerce." 930 F.2d at 1093. The defendant (who was the appellant) in that case, however, claimed only that the court had erred in instructing the jury on an aspect of Mississippi law. See *ibid.* Because the case involved no dispute concerning the Hobbs Act's interstate commerce element, the court's language was dicta.

In short, neither of the cases petitioner cites "directly presented the question of whether only an adverse effect on commerce will do; and neither opinion applies an only-adverse-effects-matter requirement to decide the case then before the court." Pet. App. 30a. There is consequently no square conflict of authority on this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999